United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 77-7201

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORIGINAL

B
B/S

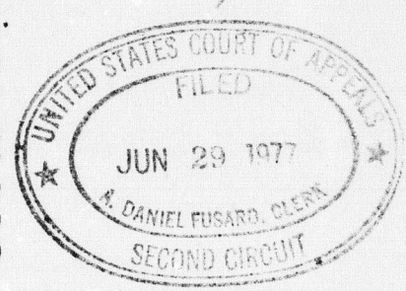
ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, Deceased,

Plaintiff/Appellant,

vs.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants/Appellees.



APPEAL FROM THE ORDER OF DISMISSAL BY THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, RENDERED BY THE HONERABLE JACK B. WEINSTEIN, JUDGE PRESIDING

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Defendants/Appellees.

APPEAL FROM THE ORDER OF DISMISSAL

ISSUES PRESENTED FOR REVIEW

1. In a Warsaw Convention case, where the ticket was purchased in the United States, does the United States District Court have subject matter jurisdiction pursuant to 28 U.S.C. § 1331 as a matter arising "under" a Treaty of the United States?

   A. Does Article 28(1) of The Warsaw Convention Expressly Provide For Subject Matter Jurisdiction in the International or Treaty Sense?

   B. Is the Fundamental Objective of The Warsaw Convention to Provide an Internationally Uniform System of Liability and Litigation Rules, and if so, Have Causes of Action Thereunder Been Stated?

C. Does the Context of Other Legal Systems Require the Warsaw Convention to be Read as Creating a Right of Action Arising Out of the Contract of Carriage?

D. Are the Cases of Komlos v. Compagnie Nationale Air France and Noel v. Linea Aeropostal Venezolana, and their Progeny Controlling, Mere Dicta, or Binding Precedent on the Issue of Subject Matter Jurisdiction?

2. May jurisdiction be found pursuant to 28 U.S.C. § 1350 in that the Warsaw Treaty establishes a uniform body of substantive aviation liability law, including standards of conduct, the violation of which provide an Alien's Action for Tort?

A. Is a Violation of the "Law of Nations" present?

STATEMENT OF THE CASE

On April 17, 1974, Appellant Abraham Benjamins, as personal representative of the estate of Hilde Benjamins deceased, for the benefit of himself and his two children (hereafter referred to as plaintiff) filed a complaint for wrongful death and conscious pain and suffering against Appellees, British European Airways (hereinafter BEA), HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP. LTD. (hereinafter collectively referred to as HSA) arising out of the worst air disaster in British aviation history (App. 1).

BEA answered the complaint on or about May 17, 1974 (App. 30) and HSA filed its answer on or about June 6, 1974 (App. 34).

The matter was consolidated with several other related cases

arising out of the same air crash under multi-district litigation Docket No. 147, In re Air Crash Disaster at Staines, England.

BEA filed its motion to dismiss plaintiff's complaint for lack of Subject Matter Jurisdiction on or about October 10, 1976 (App. 44), and HSA filed a similar motion on or about November 3, 1976 (App. 56).

On or about November 17, 1976, plaintiff filed a motion for leave to file an amended complaint (App. 38).

On November 17, 1976 the District Court granted each defendant's motion to dismiss on the grounds of lack of Subject Matter Jurisdiction in that there was no diversity of citizenship pursuant to 28 U.S.C. § 1332, but the court also granted plaintiff's motion to file his amended complaint (App. 82), which alleges, among other grounds, jurisdiction based on 28 U.S.C. § 1331 and 28 U.S.C. § 1350 (App. 9). At said time it was stipulated by the parties that each defendant would be deemed to have filed a motion to dismiss plaintiff's amended complaint on the grounds of lack of Subject Matter Jurisdiction, and the parties were ordered to file Briefs in connection therewith.

On or about January 11, 1977, plaintiff filed his Motion to File a Second Amended Complaint (App. 39), having agreed that the motions to dismiss would be deemed directed to such a second amended complaint if it were ordered filed. The Second Amended Complaint adds causes of action v. BEA for lost baggage (App. 24, 25). The parties filed their respective Briefs and the motions were heard on February 22, 1977.

On February 22, 1977, the District Court, Honorable Jack B. Weinstein, Judge presiding, granted plaintiff's Motion to File a Second Amended Complaint (App. 78, 80), and then granted the motions of BEA and HSA to dismiss plaintiff's Second Amended Complaint on the grounds of lack of Subject Matter Jurisdiction (App. 80).

Thereafter, on March 17, 1977, the District Court entered its Order of Dismissal (App. 75).

Thereafter, on April 12, 1977, plaintiff filed his timely Notice of Appeal (App. 84).

STATEMENT OF THE FACTS

As alleged by plaintiff, this case arises out of the crash of a BEA owned and operated Trident 1 Jet Aircraft, Registration No. G-ARPI (hereinafter referred to as "Papa India"). Shortly after takeoff from London's Heathrow Airport on June 18, 1972, bound for Brussells, Belgium (App. 20); all 112 fare-paying passengers, including plaintiff's decedent, Hilde Benjamins, died in that field near Staines, England, into which Papa India plummetted (App. 20). HSA, in close cooperation with BEA, designed, tested and manufactured Papa India (App. 20).

Briefly, the immediate cause of the crash of Flight 548, was the premature retraction of the high-lift devices on the leading edges of Papa India's wings (called "droops") contrary to the design specifications of the aircraft and training of the crews in its operation; BEA procedures prohibited retraction

of the droop whenever the speed was below 225 knots, while in a turn or at an altitude below 3,000 feet; there were no exceptions to this mandatory prohibition. In fact, droops were retracted at a speed of 162 knots, while in a turn and at an altitude of 1,772 feet. To retract the droops, plaintiff intends to prove that movement of the droop lever requires a deliberate and knowing human action, and that a highly experienced captain and two relatively novice second officers comprised the crew of Papa India. Of course, there were many other factors involved and contributing causes, but such are not necessarily crucial to an understanding of this case for the purposes of this Appeal. Suffice it to say, that upon retraction of the droops, Papa India went into what is known as an "out-of-configuration stall" and crashed shortly thereafter.

The estate of Hilde Benjamins is located in Los Angeles, California (App. 19). Plaintiff Abraham Benjamins (as was his wife) is a permanent resident alien of the United States, domiciled in the State of California (App. 17), but is not a citizen of the United States (App. 74).

BEA and HSA are British corporations, and each has its principal place of business in the United Kingdom[1/] (App. 17). At the time of the flight, BEA was a common carrier engaged in international air commerce (App. 19).

1/ In Personam Jurisdiction is not in issue in this case. Each defendant has answered, and thus admitted themselves, in this sense, to the jurisdiction of the District Court. Therefore, it is not necessary to recite facts concerning In Personam Jurisdiction.

Decedent, Hilde Benjamins, purchased her ticket for BEA Flight 548, in Los Angeles, California, and had with her certain hand-carried and checked baggage (App. 19).

Since plaintiff's ticket provided for points of departure and destination in the United States (App. 19. 20), the case against BEA arises under, and is governed by, Warsaw Convention, Treaty Series No. 876, 49 STATS 3000, a Treaty to which the United States has adhered (App. 20). Furthermore, BEA was a signatory to, and had filed a tariff concerning, Civil Aeronautics Board (CAB) No. 18900, Order No. E 23680 (31 Fed. Reg. 4302), more commonly known as the Montreal Agreement (App. 22).

The gravamen of plaintiff's complaint against BEA is that, under the provisions of the Warsaw Convention, BEA was guilty of willful misconduct in connection with Flight 548, and thus subject to liability not limited by Article 22 of the Treaty or the Montreal Agreement limit of Seventy Five Thousand Dollars ($75,000.00) [Plaintiff's First Cause of Action, paragraphs 10 and 13 (App. 20, 21)], but, at the very least, BEA pursuant to the Warsaw Convention, coupled with the Montreal Agreement, is absolutely liable to plaintiff, without any demonstration of fault whatsoever, for damages up to a limit of Seventy Five Thousand Dollars ($75,000.00) [Plaintiff's Second Cause of Action (App. 21, 22)].

Plaintiff's fifth claim, against BEA, alleges a violation of Articles 3 and 4 of the Warsaw Convention, and thus absolute liability without limit for failure to strictly comply with required notices on the ticket and baggage check issued to plaintiff's decedent (App. 24, 25). The sixth claim, also dependent upon the Warsaw Treaty for its vitality [Articles 18 and 30(3)], alleges absolute liability for loss of hand-carried and checked baggage in the alleged sum of One Thousand Dollars ($1,000.00) (App. 25, 26).

The claims against HSA proceed on theories of negligence [First Cause of Action], Breach of Warranty [Third Cause of Action] and Strict Liability and Tort [Fourth Cause of Action] (App. 17, 22 and 23).[2/]

2/ Inasmuch as jurisdiction over HSA is claimed pursuant to the doctrines of pendent and ancillary jurisdiction, and since such jurisdiction is a matter in the sound discretion of the District Court, Buckley v. American Federation of Television and Radio Artists (C.A.N.Y. 1974) 496 F.2d 305, cert. den., 419 U.S. 1093, 95 S.Ct. 688, reh. den., 420 U.S. 956, 95 S.Ct. 1342, issues concerning these doctrines and the basis for urging the exercise of that discretion are not fully briefed herein; this is necessarily so since the District Court did not rule on those questions, and, therefore, did not exercise its discretion. Obviously, if there is no Subject Matter Jurisdiction over BEA, said doctrines would be irrelevant and therefore unnecessary to decide, but become important only if the court does find appropriate Subject Matter Jurisdiction.

It suffices here to note plaintiff's contention that the design and manufacture of the systems which were responsible for the crash of Papa India involved questions inextricably bound up in the operations of those systems by the crew of that aircraft. Therefore, plaintiff contends that this is but one "constitutional case" which the policy behind the doctrines strongly suggest should be heard in one trial. See United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). The doctrine also, appropriately, includes pendent defendants, such as HSA. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Moore v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785.

ARGUMENT

I

SINCE PLAINTIFF'S DECEDENT PURCHASED HER TICKET IN THE UNITED STATES, AND SINCE THIS CASE IS GOVERNED AND CONTROLLED BY THE WARSAW CONVENTION, THE CLAIMS AGAINST BEA ARE MATTERS ARISING UNDER A TREATY OF THE UNITED STATES, AND SUBJECT MATTER JURISDICTION IS PROPER PURSUANT TO 28 U.S.C. § 1331

28 U.S.C. § 1331 provides that:

"The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States."

In construing § 1331, it is, of course, true that the cause of action must contain a substantial federal question. In determining whether a case is one "arising under" a treaty of the United States, the leading case of Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936) is particularly instructive:

"How and when a case 'arises under the constitution or laws of the United States' has been considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the constitution or laws of the United States, must be an element,

an essential one, of the plaintiff's cause of action. *** The right or immunity must be such that it will be supported if the constitution or laws of the United States are given one construction or effect, and defeated if they receive another." (emphasis added)

It goes without saying that, in an international aviation case wherein the Warsaw Convention applies, there have been many cases which have had to construe the language of the convention in order to determine the rights and liabilities of the parties.

For instance, plaintiff has alleged in his First Cause of Action that BEA is liable to him on a theory of willful misconduct. The definition of that term arises from the french word "dol", and decisions interpreting that word have been required in order to determine whether or not it is to be construed as "willful misconduct", "gross negligence", or some other such interpretation. See American Airlines, Inc. v. Ulen, 186 F.2d 529 (DC Cir. 1949); Goepp v. American Overseas Airlines, Inc., 281 App.Div. 105, 117 N.Y.S.2d 276, aff'd., 305 N.Y. 830, 114 N.E.2d 37 (1953), cert. denied, 346 U.S. 874 (1953); Gray v. American Airlines, Inc., 227 F.2d 282 (2nd Cir. 1955), cert. denied, 350 U.S. 99 (1956).

The very recent case of Reed v. Wiser, Jr., ___ F.2d ___ (2nd Cir. April 26, 1977) extensively considered the construction of the language of the Warsaw Convention, both in its

official French language and the unofficial English translation, and by such construction concluded that a cause of action against individual employees of the carrier would not separately lie, and thus was governed by the limitation provisions of the Convention.

Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y.), aff'd., 370 F.2d 508 (2nd Cir. 1966), aff'd., 390 U.S. 455 (1968) considered questions construing Article 3 and adequacy of Notice of Warsaw Limitations.

It would unduly extend this brief to cite all of the examples of cases wherein construction of words in the Warsaw Convention served to expand or contract, grant or deny, rights or liabilities to parties, but it can be seen from the above examples that the Gully test is clearly met in a Warsaw Convention case.

Among other grounds, plaintiff's Second Amended Complaint alleges jurisdiction pursuant to 28 U.S.C. § 1331 (App. 18); it is also alleged that the case arises out of the crash of an aircraft engaged in an "international transportation" (App. 19), and that plaintiff's decedent purchased her ticket in the United States (App. 19), which ticket was for "international transportation" with points of departure and destination within the United States (App. 19, 20); furthermore, BEA was a common carrier engaged in "international transportation" (App.19), and plaintiff's decedent was fatally injured in the crash (App. 20) and her hand-carried and checked baggage was lost or destroyed

(App. 20). The complaint therefore, is explicitly framed around, and expressly pleads, the Warsaw Convention as its source of law for recovery.

A. The Warsaw Convention Expressly Provides for Subject Matter Jurisdiction Pursuant to Article 28(1)

Article 28(1) of the Warsaw Convention provides that:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." (emphasis added)

While it is true that cases considering fundamental issues of jurisdiction have divided over the question as to whether or not Article 28(1) is a venue or jurisdiction provision, the Second Circuit has clearly and directly ruled that it must be considered as a jurisdictional provision in the international treaty sense.

In Smith v. Canadian Pacific Airways, Limited, 452 F.2d 798 (2nd Cir. 1971), this Court stated:

> "This case raises fundamental issues regarding the power of American Courts to entertain litigation involving international airline transportation. We

hold that in a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether suits may be maintained. The first level on which this opinion turns is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States Court, under Federal statutes and practice, to hear a Warsaw Convention case -- jurisdiction in the domestic law sense." (452 F.2d 798, 800).

In Smith, the plaintiff was injured on a flight from Vancouver, British Columbia, Canada, to Tokyo, and was flying on a ticket purchased by him in Vancouver. The court clearly implied that, if any of the provisions of Article 28(1) could be satisfied, the court would have fundamental Subject Matter Jurisdiction in the international treaty sense. This is manifestly so from the language of the court which states:

"We therefore look to the Convention to determine its applicability here. Only if it does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not lie, federal jurisdiction under 28 U.S.C. §1331(a), which permits the cases arising under United States treaties, clearly cannot be established. Similarly, if the Convention precludes

suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. §1332(a)(2); in other words treaty provisions being of equal constitutional status, may operate under articles VI of the Federal Constitution as limitations on diversity jurisdiction, just as requirements of jurisdictional amount may so operate." (emphasis in original) (452 F.2d 798, 802)

In Smith, the court could not fit the case within the terms of Article 28(1), and therefore necessarily concluded that the convention precluded suit within the United States. Thus, it construed the language of the Convention to determine whether or not the plaintiff therein could bring suit in the United States. Nevertheless, this Court emphatically affirmed the status of the Warsaw Convention as a self-executing treaty of the United States in the following language:

"We agree, however, that Article 28(1) '. . . must be considered as absolute and mandatory, on the national level, in the jurisdictional sense, and be given [its] proper status as a treaty obligation of our nation without equivocation.' [footnote omitted] The Warsaw Convention, by virtue of its status as a treaty made under the authority of the United States, is the supreme law of the land, equal in stature and force to the domestic laws of the United States.

U.S. Const. art. VI. It has said to be 'self-executing,' needing no congressional implementation to make it and its provisions creating a rebuttable presumption of liability (article 17) and limitations thereon (article 25) constitutionally enforceable. [citations omitted]." (452 F.2d 798, 801)

In fact, Smith not only demonstrates that Article 28(1) lays the basis for Subject Matter Jurisdiction, but notes (footnote five) that it is merely following the well settled Second Circuit rule on the subject. Thus, the court considers the following cases to be ones which have interpreted Article 28(1) as "subject matter jurisdiction" decisions: Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2nd Cir.), cert. denied, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed.2d 64 (1965); Neudo v. Societe, etc. Sabina Belgian World Airlines, 207 F. Supp. 191 (E.D. Pa. 1962); Martino v. Transworld Airlines, Inc., 1961 U.S. and Can. Av. 651 (N.D. Ill. 1961).

Of major significance to the Smith court, which leads inexorably to its conclusion, is that Article 32 of the Convention "prohibits alteration of the rules 'as to jurisdiction,' the effect of which is to underscore the mandatory nature of Article 28(1). [footnote omitted] This reading would support a conclusion that Article 28(1) is jurisdiction in the larger or treaty sense." (emphasis added) (Smith v. Can. Pac. Airways, Ltd., supra, at p. 801).

In Eck v. United Arab Airlines, Inc., 360 F.2d 804 (2nd Cir. 1966), this Court held that a passenger who is a California resident could maintain an action against the United Arab Republic Airline Corporation in the United States under the Warsaw Convention provisions where the plaintiff had purchased the ticket in the United States through an office of another airline which confirmed that flight directly with the defendant airline in Egypt. Smith points out that:

> "While Eck speaks in terms of venue, there was treaty jurisdiction there as we view it."
>
> Smith v. Can. Pac. Airways, Ltd., supra, footnote 14, p.803.

The case of Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir. 1964) involved issues very similar to those confronting this Court. There as here, the plaintiff was not a citizen of the United States, but the ticket he travelled on had been purchased in the United States. Seth's claim was for the loss of checked baggage pursuant to Article 18(1) of the Warsaw Convention (it may be noted that plaintiff's sixth claim against BEA is also for loss of checked baggage, although the amount claimed is but $1,000.00). The court held:

> "By adhering to the Warsaw Convention the United States agreed to a treaty which in its Article 18(1) provides that the air carrier 'shall be liable for damage sustained' in the event of the loss of checked baggage taking place 'during the transportation by air' as comprising 'the period

during which the baggage' is 'in charge of the carrier, whether in an airport, or on board an aircraft.' Moreover, the Convention in its Article 30(3) provides that in the case of transportation by various successive carriers falling within the definition of one undivided transportation as defined in its Article 1(3), which Seth's transportation undoubtedly was, the passenger entitled to delivery 'shall have a right of action against the last carrier'. Thus the convention not only imposes liability on an air carrier for the loss of checked baggage but also gives a passenger whose baggage is lost a right of action to enforce that liability. Seth's action, therefore, seems clearly to be one arising under the treaty of the United States."

Seth v. BOAC, supra, p. 305.

It might be argued that Seth is not authority in this action since that case involved a baggage claim in excess of $10,000.00 as pled by that plaintiff -- his recovery was $331.60 -- whereas in this case plaintiff's claim for damage to baggage is but $1,000.00. Thus, the jurisdictional amount was present for baggage only in Seth but not here; also one might argue that there should be a distinction between a wrongful death case brought pursuant to Article 17 of the Convention as opposed to a baggage claim brought pursuant to Article 18;

and that that distinction should be respected as a result of "nice" language distinctions, which, though microscopic, can be exploded beyond the evident intent of the framers of the Convention. To do so, it is respectfully submitted would violate the injunction laid down in Eck v. United Arab Airlines, Inc., supra, at p. 812 that:

> "The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a 'verbal prison'."

Clearly, this Court, as did the Eck court, will "reject 'the tyrany of literalness'."

B. The Fundamental Objective of the Warsaw Convention is to Provide an Internationally Uniform System of Liability and Litigation Rules, Pursuant to Which Plaintiff Has Stated Causes of Action

It is respectfully submitted that, in order to declare that the District Court has no jurisdiction over this action, one would have to utterly ignore the intent of the framers of the Warsaw Convention.

It is clear, and this Court has consistently held:

> "Those called upon to construe a treaty should, in the words of Judge Clark, strive to 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties'."

Day v. Transworld Airlines, Inc., 528 F.2d 31, 35 (2nd Cir. 1975).

Specifically, this Court has held that the Warsaw Convention is a treaty which must be interpreted "in a manner that will carry out the framer's intent."

Reed v. Wiser, Jr., ___ F.2d ___ (2nd Cir. April 26, 1977).

The Reed case is most instructive on the subject of the construction of the Warsaw Convention, and is the latest expression of the Second Circuit in this area. It is specifically there held that "the convention was intended to act as an international uniform law, see Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967), and therefore must be read in the context of the national legal systems of all of its members." (emphasis added) Slip Opinion, p.7.

Judge Mansfield, in Reed, stated:

"Confronted with the prospect of a jungle-like chaos unless a uniform system of liability rules governing fundamental aspects of international air disaster litigation was devised, the framers of the convention proceeded to draft a treaty which laid down uniform rules as to venue (Article 28), burden of proof (Article 20), standards of negligence (Articles 20 and 25), presumptions (Articles 18(3) and 26), contractual liability limitations (Article 23), suits against

the estate of the tortfeasor (Article 27), statute of limitations (Article 29), liability in the event of carriage by more than one carrier (Article 30) and damage awards (Articles 22 and 25). In the five instances where the law of the forum is to apply, the rules so state explicitly. See Sundberg Air Charter: A Study in Legal Development 242 (Stockholm 1961); Article 21 (contributory negligence), Article 24(2) standing of and allocation among survivors), Article 25 (fault equivalent to dol), Article 28 (procedure), and Article 29 (running of statute limitations)." Slip Opinion, p.23.

Thus, in approaching the task of determining the framers' intent, it is well to recall the guidelines for interpretation of the Convention set forth in Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2nd Cir. 1966), cited with approval in Reed:

"A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a 'verbal prison'. Other considerations, such as the court's

sense of the conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose. The inquiry may lead the court to conclude that the provision's language accurately reflected its purpose; in such a situation the court is most faithful to the purpose if the language is interpreted literally. Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer. It would be inconsistent with the 'wise counsel to reject "the tyrany of literalness,"' if the court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion." (citations omitted).

Consequently, in order to be true to the requirements set forth in Reed, we must now attempt to determine the intent of the framers of the Warsaw Convention, and review the Convention in the context of the National Legal Systems of other major High Contracting Parties.

Mr. G. Nathan Calkins, Jr., Esq., Chairman of the United States Delegation to the Hague Conference To Amend the Warsaw Convention, wrote a particularly illuminating two-part Article directly concerned with the issues here raised, which are found at 26 The Journal of Air Law & Comm. 217 (Part 1), 323 (Part 2). Mr. Calkins meticulously traces the origins, drafts and debates of the delegates to the Convention and of the International Technical Committee of Aerial Legal Experts (CITEJA), and concludes, in the strongest language:

> ". . . the author is convinced that the draftsmen of the Convention intended to create a right-of-action based on the contract of carriage; that the draftsmen did in fact carry this intention out in the Convention as signed; that it is self-executing; and therefore the supreme law of the land today."
>
> 26 J. Air L. & Comm. 217, 218.

In support of that contention, one should note the comments of Mr. De Vos, the Reporter of the Convention, who pointedly said:

"Thus the text applies single-mindedly to the contract of carriage - - - first in its outward manifestations of form and then in the legal ties which are established between the carrier and the persons carried or who ship. . . .

***

As it involves liability arising by reason of specific contracts of carriage, the Convention very evidently will apply only to damage caused by the equipment used in such carriage in the performance of the contract." (emphasis added) Warsaw Minutes and Documents, p. 160.

Thus, it is respectfully submitted, a cause of action arising out of an international aviation accident, within the Warsaw Convention, is one based upon, and receives its vitality from, the contract of carriage as regulated by the terms of the Convention. If it were otherwise, the Convention could not afford the "more definite basis of recovery" referred to by Secretary of State Cordell Hull in his letter of transmittal to the Senate in 1934,[3/] nor would the "jungle-like chaos" enjoined by Circuit Judge Mansfield in the Reed decision be avoided.

3/ Senate Comm. on Foreign Relations, Message from the President of the United States transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

In Reed v. Wiser, Jr., ___ F.2d ___ (2nd Cir. April 26, 1977, at p. 21 of the Slip Opinion) it is stated:

"Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved. As Administrator Halaby of the FAA later stated before the Senate Foreign Relations Committee:

> 'The problem of finding one's way through this thicket of foreign laws would be extremely difficult for the individual, passenger, or shipper . . . The Warsaw Convention, by providing a uniform rule of law which governs the relationship of the airline operator and his passenger or shipper in all of these different situations has for almost forty (40) years provided a degree of certainty making it possible for the individual passenger or shipper and the airline operator to be reasonably certain what their legal relationship with each other is, and to act accordingly. . . .'

"Hague Hearings at 20. A May 26, 1965, letter from the Civil Aeronautics Board to the Committee reflected the same sentiment:

> 'The major benefits of the [Warsaw] convention to passengers, shippers and carriers arise from the creation of a uniform body of substantive aviation liability law, applicable regardless of the place of injury, domicile of the passenger or shipper, or the nationality of the airline involved. Not only are the rights of recovery for passengers in the event of personal injury or death both assured and provided for in the convention, but the convention contains numerous provisions defining the respective rights of the consignor, consignee and carrier of air cargo . . . These provisions of substantive law are applicable to all claims wherever and however brought, and protect the claimant from provisions of foreign law or exemplary clauses in the ticket which tend to relieve the carrier from liability, fix a lower limit of liability from that provided for in the convention, or otherwise infringe upon the rules laid down by the convention.

'In the absence of the convention, a claimant could be subject to a maze of conflicting principles of conflicts of laws. The discovery and proof of appropriate law to be applied in cases where accidents occur in foreign jurisdiction presents one of the most difficult problems lawyers must face.'"

Throughout the debates at the Convention, it was made clear that the entire purpose of the Convention was to create a uniform body of law, that the law of the place of the accident should have no bearing on the right of a person to recover, and that local law could not deviate from the terms of the Convention. It was specifically debated by the drafters of the Convention as to whether or not the place of the accident should control the law of the case. Mr. De Vos, the Reporter, recorded the following statement from Mr. Clarke, of Great Britain, who stated:

"The first point to be brought out is that the place of accident has absolutely no connection with the contract or with the place to which the parties are considered to have given jurisdiction. Ordinary contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract.

The second point which concerns us is that in

the course of long journeys, such as the trip from London to India, you pass through countries where courts are not at all well organized. You will have very great difficulty for example in bringing suit before the courts of Persia or Mesopotamia. The carrier also would have enormous trouble in defending a case which might be brought in these far-off countries, where the courts really are not well-organized. It is for these two reasons that the British delegation proposes the deletion of the words 'or in the case of the failure of the aircraft to arrive, at the place of the accident.'" (emphasis added)

Warsaw Convention Documents, pp. 77-79.

During the same debate, Mr. Ripert, of France, in support of the British position, said:

"Jurisdiction in courts of the place where the accident occurred is justified when the victim is a third person, a stranger to any contract of carriage, and who has the right to be protected against the carrier. But when there is involved a shipper of goods or a traveler who has entered into a contract and who by that fact alone has placed himself under the governing rules of the convention and the law of the contract, there is no reason at all for that person to go trying his

case before any old court which happens, by chance, to be the court of the place of accident. Not only is there no reason for it but it is extremely dangerous because if in the convention we say that the court of the place of accident has jurisdiction; it will not have jurisdiction unless the state where one wants to begin action has ratified the convention. Consequently, we would find outselves in the presence of a very complicated rule. It would be necessary for the victim to know whether the state at the place of accident has ratified the convention.

We have inserted this rule in the draft convention on third party liability (in Citeja) where there is justification for it; but for liability arising out of an accident, I believe that we must let the usual rule of contracts apply and suppress this novel rule, which is not found in any other convention." (emphasis added)

Warsaw Convention Documents, pp. 77-79.

The British proposal was adopted.

When the Japanese Delegation attempted to amend the Convention by reserving to individual states the ability to depart from provisions of the Convention, that proposal was overwhelmingly defeated by the delegates. Mr. DeVos stated:

"The opinion of your reporter is very clear and very brief; it is absolutely impossible to accept this amendment; to do so would be to completely upset the basic principles of this draft, which is a compromise and of which one of the first principles is the interdiction of clauses of exoneration."

Warsaw Convention Documents, pp. 24, 25.

Sir Alfred Dennis, representing Great Britain, stated: "As regards the British Government, the sole reason which it has for entering into this convention is the desire to attain uniformity. If the conference adopts the viewpoint of Japan, we would be completely defeated in this desire. The draft convention is contrary on many points to our own law and to our customs, but we have decided to make sacrifices in order to attain this uniformity of system."

Warsaw Convention Documents, pp. 24, 25.

Article 17 of the Convention provides:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the

aircraft or in the course of any of the operations of embarking or disembarking."

Article 23 of the Convention states:

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

Article 24 provides:

"(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

Article 25 provides:

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or

by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

Those Articles, when read together, and in context with each of the other Articles of the Convention, lead clearly to the conclusion that the intention of the framers was to establish a right of action based upon the contract of carriage.

Perhaps, the observation of Mr. Calkins, Jr. that "a slight mis-translation from the French to the English text" in Article 24 could be a basic reason for confusion as to whether or not the basis of the cause of action is fundamentally the Convention or national law.

26 J. Air L. & Comm. 217, 225-226.

The official French text of Article 24 is as follows:

"(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention. ***" (Emphasis added).

The problem, perhaps, arises out of the translation of the emphasized words above into the English word "conditions" as was done in the unofficial English text. Prior drafts, and their English translations, as well as the translations of the remarks of the reporter, indicate that they were speaking of the liability action being brought on "the basis of the convention." Minutes and Doc., Citeja, 3d Sess., Madrid, 1928, pages 53, 54, 66, 67. As explained in the Calkins' article, at page 226 (footnote 21):

> "The English translation of this word as 'conditions' in the official U.S. text of the Convention, Article 24 may be one of the reasons for Judge Leibell's decision. See 111 F. Supp. 393 at 402. Le Nouveau petit Larousse gives 'conditions' several meanings, including the English legal sense. However, it also defines it as 'the fundamental basis', and it is apparent that the Citeja was using it in the latter sense. Thus 'terms' appears to be a better translation."

C. In the Context Of Other Legal Systems Adhering to the Convention, Warsaw Must be Read as Creating a Right of Action Arising From the Contract of Carriage

Professor H. Drion, Netherlands representative at the 1955 Hague Conference, in commenting on the purpose of Article 24, stated its purpose to be:

". . . to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage."
H. Drion, Limitation of Liabilities in International Air Law, 158 (1954).

It is not possible, here, to exhaustively review the legal system of each of the more than one hundred High Contracting Parties to the Warsaw Convention. However, a sample survey should suffice to demonstrate that without exception, the other parties of the world have construed the Warsaw Convention to create a right of action arising out of the contract of carriage.

The French Air Navigational Law of 1924 declares the air carrier a guarantor of the safety of the passengers and goods, and bases recovery on an implied doctrine of contractual liability. It provides that a public carrier is liable to the representatives of a deceased passenger on an implied provision in the contract of safe carriage. Air Navigation Law of May 31, 1924 (1924) Journal Officiel 5048 (Fr.).

Article 1147 of the French Civil Code provides:
"A debtor shall be ordered to pay damages if there is occasion therefor, either on account of non-performance of the obligation or on account of delay in performing it, whenever he does not establish that non-performance is due to an outside cause which cannot be charged to him provided there is no bad faith on his part."

French Civil Code 322 (Rev.ed., Cochard transl. 1930). The remarks of Mr. Ripert, supra, at the Warsaw Debates clearly indicate his view that the contract of carriage is controlling as the French understand it, and that it would be "novel" to view the matter otherwise; furthermore, he went on to say:

> ". . . we are absolutely opposed to any provision which would return the application of the matter to national law. . . . As we see it, the convention would be destroyed, if recourse to national law is established for each article. . . but I implore the delegates not to take this dangerous path which consists of reserving the solution of the litigation to national law." (emphasis added) Warsaw Minutes & Doc., p. 44.

The Italian Air Navigation Act of 1924 and Article 1218 of the Italian Civil Code, in similar fashion, are interpreted to give the passengers or their representatives a contractual cause of action against the carrier. Italian Navigation Act of 1924, (1924), Revue Juridique Internationale de la Locomotion Aeriennes 51, Article 39, §2.

See also: Brazil, Brazilian Air Code (1938), Chapter V; Chile, Hamilton, Manuel de Derecho Aéreo, p. 449 (1950); France, Juglart, Traité Elementaire de Droit Aerien, p. 240 (1952); Mexico, Rigalt, Principios de Derecho Aereo, p. 124, §66 (1930). Each of the foregoing demonstrates that the basic law of those countries provides that the contract of carriage is the basis

of liability, and may be summarized in the words of Eduardo Hamilton in his Manuel de Derecho Aereo, Santiago, Chile (1950), p. 449 (translation G.N.C.) as follows:

> "Liability of the carrier is borne in the contract of carriage and the obligations which flow from it and may be summarized as follows: to carry the passenger free of damage and within the terms and times stipulated."

Our common-law cousins, the United Kingdom, Canada and Australia, have enacted substantially similar legislation, each of which basically provides that, in any action covered by the Convention, it, and it alone, is the source of liability; that when the Convention applies, such liability is in substitution for any other liability of the carrier under any statute or common-law provision. See: England, Carriage by Air Act, which provides in Section (4) that:

> "(4) Any liability imposed by Article Seventeen of the said First Schedule [The Warsaw Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common-law . . ." 22 & 23 Geo. 5, C. 36; reenacted, 9 & 10 Eliz. 2 c. 27.

Canada: Carriage by Air Act 1939, 3 Geo. VI, C.12 effective September 8, 1947; Australia: Civil Aviation (Carrier Liability) An Act Relating to Carriage by Air (assented to 21st April 1959).

D. Neither Komlos v. Compaigne Nationale Air France Nor Noel v. Linea Aeropostal Venezolana, Nor Their Progeny, Control on the Issue of Subject Matter Jurisdiction

At the outset of this discussion, it should be emphasized that the test set forth in Gully v. First National Bank, supra, p. 9, does not require that a treaty establish an entire cause of action before it will support a claim to jurisdiction under § 1331 but rather that a right or immunity merely need be an essential element of the cause of action. Therefore, the mere omission of a particular aspect of plaintiff's cause of action, if it were to be so construed, from the Warsaw Convention would not eliminate subject matter jurisdiction.

Secondly, with respect to subject matter jurisdiction, it is not necessarily crucial to plaintiff's position whether or not the treaty in fact does create a cause of action. The leading case of Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), squarely deals with the issue of whether or not jurisdiction depends upon a right of action being created by the Fourth Amendment to the United States Constitution. In that case, plaintiff brought suit in federal court against F.B.I. agents for violation of Fourth Amendment rights. Jurisdiction was bottomed on 28 U.S.C. § 1331. The District Court

dismissed the case for lack of subject matter jurisdiction by holding that the Fourth Amendment did not create a cause of action and therefore the case did not "arise" under the Constitution (71 F. Supp. 813). The Ninth Circuit Court of Appeals affirmed at 150 F.2d 96 (1945). The United States Supreme Court reversed in the following language:

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a "suit arising under" the . . . [Constitution or laws] of the United States by his declaration or bill.' The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716, 717. Jurisdiction therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."
>
> 327 U.S. at pp. 681-682.

It should be here recalled that plaintiff's second claim is bottomed squarely upon the Warsaw Convention as modified by the Montreal Agreement which is binding upon BEA (CAB

No. 18900, Order No. E23680; 31 F. Reg. 4302), in that plaintiff claims BEA to be absolutely liable to him, without any demonstration of fault on their part, in the sum of Seventy Five Thousand Dollars ($75,000.00). The "essential element" of plaintiff's claim, thus, is the validity and construction of the Warsaw Treaty and the Montreal Agreement. Without those essential elements, plaintiff would have no basis to plead his second claim. Furthermore, the Montreal Agreement has a status more important than simply a contract between air carriers and the United States; the provisions of that agreement have been adopted by the above referenced order of the Civil Aeronautics Board (CAB) which Board has been given that power by the Federal Aviation Act of 1958, § 204, (49 U.S.C. § 1324), and therefore carry the force of law. It follows, that BEA is required by law, in its tariff, to include the provisions of the Montreal Agreement, and failure to do so would be a violation of § 403 of the Federal Aviation Act of 1958 (49 U.S.C. § 1373). One must, therefore, conclude that the Montreal Agreement, to which BEA has subscribed, is a part of our federal law and that plaintiff's second claim "arises" thereunder.

In turning to a specific discussion of Noel v. Linea Aeropostal Venezolana, 247 F.2d 667 (2nd Cir. 1957), cert. denied, 355 U.S. 907, 78 S.Ct. 334, and Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y., 1952), rev. 209 F.2d 436 (2nd Cir. 1953), cert. denied, 348 U.S. 820, 75 S.Ct. 31, it should be noted that Judge Weinstein, in the District Court below, commented that:

"This matter is an important one and should be resolved by the Circuit Court after a full consideration and analysis. The court has found no such full consideration and analysis in any of the Second Circuit decisions." (App. 79)

Nevertheless, Judge Weinstein stated his belief that the District Court "is bound by the dicta in Noel v. Linea Aeropostal Venezolana . . ." (App. 78).

Indeed, Noel did not analyze the question before this Court in the context of § 1331 subject matter jurisdiction, but merely adverted to the Komlos decision by stating:

"In any event, we agree with our prior decision in Komlos v. Compagnie Nationale Air France, 2d Cir., 1953, 209 F.2d 436, 438, which impliedly agreed with Judge Leibell's decision Komlos v. Compagnie Nationale Air France, D.C.S.D.N.Y. 1952, 111 F. Supp. 392, that the convention did not create an independent right of action." (247 F.2d at 679).

Noel was an action for death that occurred either over or on the high seas brought under the Federal Death on the High Seas Act, but on the civil side rather than admiralty. On motion to dismiss, based on exclusivity of jurisdiction in admiralty, the court dismissed the action on the grounds that it did not have subject matter jurisdiction of the action of a civil suit.

The primary historical document relied upon in both Noel and Komlos to support their conclusions is Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934 wherein he said that "the effect of Article 17 (ch. III) of the Convention is to create a presumption of liability. . . ." It is respectfully submitted that, in the face of the overwhelming evidence derived from the debates of the Convention by the other High Contracting Parties, and the exhaustive commentaries of Mr. Calkins, the Chairman of the U. S. Delegation to the Hague Conference, that single phrase lifted from a rather lengthy letter written, clearly not for the purpose of construing the issues before this Court, or the words of the convention, but rather to express the Secretary's considerations in recommending the treaty, is not alone persuasive. If it were otherwise, one might risk demeaning Secretary Hull's understanding of the doctrine of res ipsa loquitur as compared to his understanding of the shifting burden of proof provided by the Convention, for, while the analogy is apt, the two are not strictly comparable.

Nevertheless, it is submitted that the holding in Noel to the effect that Warsaw does not create a cause of action for wrongful death, is dicta. Strictly, Noel merely, and correctly, holds that Congress, in enacting the Death on the High Seas Act, intended to make admiralty the exclusive jurisdiction with respect to the law of death occurring on the high seas. The only necessary part of the Noel opinion is

toward that issue, and the result would have been the same had the Court of Appeals affirmed the decision below in ruling that deaths occurring over as well as on the high seas are exclusively in admiralty, and that an action brought on the civil side must be dismissed.

Similarly, it is plaintiff's belief that the decision in Komlos is dicta. In that case, the decedent's Worker's Compensation Insurance Carrier and decedent's sister each commenced wrongful death actions. The immediate issue was whether or not the Compensation Carrier was a statutory assignee of the wrongful death claim purportedly held by the decedent's mother. In the wonderful world of litigation, it happens that the defendant, Air France, supported the proposition that the Warsaw Convention indeed did create a cause of action, and, at that, it was "ex contractu". Thus, strictly speaking, subject matter jurisdiction for purposes of § 1331, had nothing to do with that case. Furthermore, it was unnecessary to decide whether or not Warsaw created a cause of action, for nothing in the Convention automatically makes the cause of action supersede any other; rather, it merely supersedes all other causes of action based upon the contract of carriage. Article 24 of the Convention prevents that device from being used to get around the limitations on liability in the Convention. But, whether or not the mother had the exclusive remedy, to the exclusion of the sister, and whether or not the mother's remedy was assigned to the Insurance Carrier,

are all issues which do not require the "cause of action" discussion indulged in by Judge Leibell.

On appeal, Judge Leibell was nominally reversed, but this Court did not analyze the Convention, its history and interpretation in any respect; the only sentence that the Noel court could seize upon to declare that it impliedly agreed with Judge Leibell's discourse on causes of action appears to be the first sentence of the opinion, which reads:

> "For the death of Emory Komlos, there is a single indivisible cause of action with two items of damage." 209 F.2d 436, 438.

Nonetheless, it is respectfully submitted, that, even if not strictly dicta, the analysis of Judge Leibell fails to take into consideration the very substantive law provisions of the Convention. That it does create such a substantive body of law has been recently upheld in Reed v. Wiser, Jr., supra, and can be easily supported:

> "A list of these conventional factors (which ordinarily are regarded as substance controlled by the law of the place of accident) follows:
>
> 1. Traditional concepts of conflict of laws provide that the effect of contributory negligence as a matter of defense is determined by the law of the place of wrong. Article 21 places this determination in the forum.
>
> 2. Traditional concepts of conflict of laws

provide that vicarious liability is determined by the place of wrong. This is overruled by Article 20(1) requiring that the carrier is liable unless he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to do so, and by Article 25(e), which imposes a conventional rule of respondeat superior for wilful misconduct.

3. Traditional concepts of conflict of laws provide that the state which created the right can modify or discharge it. The convention prohibits this (Article 24(2)), (Article (23)).

4. Traditional concepts of conflicts of laws provide that whether a cause of action survives the death of the tortfeasor depends on the law of the place of wrong. Article 27 provides for survival of such an action.

5. Traditional concepts of conflict of laws provide that the standard of care (responsibility depending on intent to harm, negligence, or absolute liability) is determined by the place of wrong. The convention provides a uniform standard --- Article 20, Article 25.

6. Traditional concepts of conflict of laws provide that a recovery under a death statute

of the place of wrong cannot be had after the time fixed for bringing action has elapsed. Article 29 of the Convention extends this to 2 years and, provides that calculation of the period shall be in accord with the law of the forum." Gene Nathan Calkins, Jr., "The Cause of Action Under the Warsaw Convention", Part 2, 26 Journal of Air Law and Commerce 323, 338.

From the foregoing, it is respectfully submitted that plaintiff has demonstrated that the District Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331, and that, truly, there is no comprehensive analysis in the Second Circuit which concerns itself with the issue of subject matter jurisdiction and that this case is, indeed, one of first impression in this Court.

II

THE WARSAW TREATY, COUPLED WITH THE MONTREAL AGREEMENT, ESTABLISHES A UNIFORM BODY OF SUBSTANTIVE AVIATION LIABILITY LAW, INCLUDING STANDARDS OF CONDUCT, THE VIOLATION OF WHICH PROVIDE AN ALIEN'S ACTION FOR TORT AND THUS JURISDICTION MAY BE FOUNDED PURSUANT TO 28 U.S.C. § 1350

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28 U.S.C. § 1350 provides:

> "The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of the nations or a treaty of the United States."

Plaintiff has, in his amended and second amended complaints, alleged, as alternative jurisdictional grounds, that the District Court has subject matter jurisdiction in that this is an Alien's Action for Tort (App. 9, 18).

If the analysis under the first argument of this brief is rejected, it must be because the court finds, among other things, that the causes of action asserted by the complaint are actions sounding in tort. That plaintiff is an alien is a fact which neither defendant herein would contest. That the Warsaw Convention is a treaty is a proposition too well established to need further citation.

Dreyfus v. Von Fink, 534 F.2d 24 (2d Cir. 1976), discusses the principles underlying jurisdictional criteria of § 1350. It is therein explained that subject matter jurisdiction is appropriate when the treaty relied on is self-executing, prescribes rules upon which private rights may be determined and provides for United States jurisdiction.

That the Treaty is self-executing is well established in this Circuit. Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 801 (2d Cir. 1971). Furthermore, it cannot be questioned that the Warsaw Convention prescribes rules upon which private rights may be determined, for as stated in Reed v. Wiser, Jr., ___F.2d___ (2d Cir. April 26, 1977):

> "Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved." (page 21 of Slip Opinion).

Unquestionably, in this case, Article 28(1) provides that the United States is a proper forum in that the ticket in question in this case was purchased in the United States (App. 19, lines 21 through 25).

Thus, the only possible question that could remain with respect to § 1350 jurisdiction, if any question, indeed there is, is whether or not plaintiff's complaint alleges a "violation" of the treaty. It might be noted, in passing, that jurisdiction pursuant to § 1350 does not concern itself with

the amount in controversy.

The first area of violation that we may examine is contained in plaintiff's second claim for absolute liability of BEA (App. 21).

> "Under the Warsaw Convention, as modified by the Montreal Agreement, [the carrier] would ordinarily be absolutely liable for the deaths of the . . . passengers, but its liability would be limited in the amount to $75,000.00 per passenger unless plaintiffs could show willful misconduct."
>
> Reed v. Wiser, Jr., supra, Slip Opinion, pg. 2.

The very fact that the Convention, as modified by the Montreal Agreement, creates a treaty obligation to pay up to $75,000.00, and plaintiff has alleged that that total sum is owing and by the very fact that BEA has failed to pay that sum to plaintiff, itself shows a violation of the Treaty. The requirement to pay is absolute and mandatory, and plaintiff has been required to commence this action in order to recover thereon. No clearer example of a violation arising out of a treaty could exist.

Secondly, plaintiff's first claim against BEA for willful misconduct (App. 17) also alleges a violation of the Treaty obligation. Clearly, the intent of the drafters of the Warsaw Convention was to enjoin air carriers from committing acts of willful misconduct. The matter, indeed, is so serious that, in the event of proof of such conduct, the drafters removed the most significant protection the Convention gave to the

the carrier --- the limitation upon liability! The Reed decision makes it clear that the Convention is to be construed as laying down a uniform system of liability rules, including standards of negligence (Articles 20 and 25) (Slip Opinion pg. 23), and it is equally clear that the Convention provides for the consequences in the event of violations of those standards, to wit: liability for wrongful death (Article 17), the so-called "all necessary measures" defense (Article 20), contributory negligence (Article 21), limitation upon liability (Article 22) and the violation of standard of conduct which removes the limitation of liability (Article 25).

The next alleged violation is found in plaintiff's fifth claim (App. 24). Therein it is alleged that defendant BEA accepted the decedent as a passenger with a ticket and baggage check that did not meet the requirements of Articles 3 and 4 of the Convention (App. 25). Were plaintiff's claim to be sustained, then under the doctrine of Lisi v. Alitalia-Linee Aeree Italiane, 253 F.Supp. 237 (S.D.N.Y.), aff'd., 370 F.2d 508 (2d Cir. 1966), aff'd., 390 U.S. 455 (1968) and Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), cert. den. 382 U.S. 816 (1965), BEA would have absolute unlimited liability to plaintiff. This plaintiff, as did each of the other plaintiffs in the consolidated multi-district litigation cases of which this was a part, asserted the position that the mandatory language of the Warsaw Convention with respect to the notices on the ticket and baggage check did not comply

with the Convention's requirements in that the Notice was equivocal. Plaintiff acknowledges, to this Court, that the trial judge, in the court below, overruled the position of the plaintiffs in the companion cases, although it did not rule on those issues in this case, for the simple reason that the motions with respect to jurisdiction were first heard. Regardless, for subject matter jurisdiction purposes, it is clear that a violation of the Warsaw Treaty has been alleged, and it is clear that the United States District Court is the proper forum to rule upon the adequacy of the notice requirements. If the notice were faulty, there can be no question but that it would be a violation of the requirements of Articles 3 and 4.

The fourth violation of the Convention alleged by the plaintiff may be found in his sixth claim against BEA (App. 25). Herein it is alleged that BEA lost or destroyed the decedent's checked baggage, and pursuant to the provisions of the Convention, Articles 18 and 30(3), BEA is liable for the loss (App. 26).

Article 18 reads, in relevant part, as follows:

"(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during thich the baggage or goods are in

charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever. (3) * * *"

Article 30(3) states:

"(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to consignor or consignee." (Emphasis added)

The only Appellate case of which plaintiff is aware directly construing the effect of Articles 18 and 30(3) is Seth v. British Overseas Airways Corporation, 329 F.2d 302 (1st Cir. 1964). In that case, the plaintiff, who is not a United States citizen, filed his action for lost baggage in the United States claiming that the ticket he was travelling on was purchased in the United States, and therefore, jurisdiction was properly founded in the District Court pursuant to 28 U.S.C. § 1331(a). The Court held:

"By adhering to the Warsaw Convention the United

States agreed to a treaty which in its Article 18(1) provides that the air carrier 'shall be liable for damage sustained' in the event of the loss of checked baggage taking place 'during the transportation by air' and in its Article 18(2) defined 'the transportation by air' as comprising 'the period during which the baggage' is 'in charge of the carrier, whether in an airport or on board an aircraft.' Moreover, the Convention in its Article 30(3) provides that in the case of transportation by various successive carriers falling within the definition of one undivided transportation as defined in its Article 1(3), which Seth's transportation undoubtedly was [as, it might be noted, was plaintiff's in the case at bar], the passenger entitled to delivery 'shall have a right of action against the last carrier.' Thus, the Convention not only imposes liability on an air carrier for the loss of checked baggage but also gives a passenger whose baggage is lost a right of action to enforce that liability. Seth's action, therefore, seems clearly to be one arising under a treaty of the United States." 329 F.2d 302, 305.

Unquestionably, then, the explicit language found in Article 30(3) not only requires a holding that it creates a cause of action, but when read together with Article 18 clearly demonstrates that a claim brought pursuant to those provisions is one alleging a violation of a treaty.

Since there is no jurisdictional minimum amount in controversy required by 28 U.S.C. § 1350, the conclusion is inescapable that the District Court has Subject Matter Jurisdiction arising therefrom.

A. Plaintiff Has Alleged A Violation Of The "Law of Nations."

A ". . . violation of the Law of Nations arises only when there has been 'a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se.'" IIT v. Vencap, Ltd., 519 F.2d 1001,1015 (2d Cir. 1975).

In the case at bar, it would appear that the Warsaw Convention, itself reflects a "Law of Nations" since, as we have already seen, it contains numerous standards and rules, and surely affects the relationships so specified. Many foreign airlines which are subject to the Warsaw Convention are government-owned and operated, such as KLM Royal Dutch Airlines. Thus, the Warsaw Convention would affect the relationship

between an individual as he faced that government's direct interests and regulates the matter and amount by which recoveries can be had in an air crash disaster.

When one adds to this mixture the provisions of the Montreal Agreement, itself a document reflecting the "Law of Nations", one can readily discern that relations between states are considerably affected. The following brief history will serve amply to demonstrate that the relationships among nations has been severely affected by considerations relating to the Convention, and modifications thereof. It may be recalled that, in September 1955, the International Conference On Private Air Law at the Hague ("The Hague Conference") convened for the purpose of modifying the Warsaw Treaty; although the United States was a signatory to the Protocol which ultimately resulted from the Hague Conference, nevertheless it was never ratified by the United States Senate. There was dissatisfaction with the low limitation on liability, and the Senate Committee on Foreign Relations, ultimately, in 1965, recommended ratification only if certain insurance legislation was enacted to help raise the limit (Sen. Exec. Rpt. No. 3, 89th Cong., 1st Sess. 6-7 1965). See, generally, Lowenfeld Aviation Law, §5.41-5.42 (1972).

> "When it became evident that the insurance legislation stood no chance of passage, the Administration unsuccessfully attempted to induce the carriers to waive the liability limitation up to $100,000.00 under Article 22(1), which provides that 'by special contract,

the carrier and the passenger may agree to a higher limit of liability.' Thereupon the United States gave formal notice of denunciation of the Convention, to become effective in six months time, but left open the possibility that it might withdraw if an interim waiver of liability limitations up to $75,000.00 per passenger were forthcoming from the airlines, pending a full-scale revision of the limits by International Agreement up to $100,000.00. "At this point a Conference was convened in Montreal to see if an acceptable compromise could be worked out. Intensive private negotiations led on Friday, May 18, 1966 to the withdrawal of the Notice of Denunciation and the execution of an agreement, known as the Montreal Agreement, which provided for absolute carrier liability up to $75,000.00 on all flights into or out of the United States. In all, over 150 carriers subscribed."

Reed v. Wiser, Jr., ___F.2d___, Slip Opinion, pp. 14, 15 (2d Cir. April 26, 1977).

Obviously, when the United States denounces an International Treaty, but withdraws its denunciation only upon the proviso that any carrier flying into or out of the United States must agree to raise its limits up to $75,000.00 it has affected each of the relationships required under the IIT test. Clearly,

the implied power of the Government to prohibit landing rights to a foreign air carrier within the United States was an exercise of governmental power and political pressure affecting not only the rights between states, but also the rights between the individuals who may be victims of air disasters and the foreign states. As pointed out above, the violation by BEA is clear: it owes plaintiff $75,000.00, and has refused to unconditionally pay that sum.4/

The second prong of the IIT test is also satisfied. Who can doubt but that the actions of the United States Government in demanding more reasonable limits on liability was not acting for the common good of its citizenry as well as for the good of the government and its several states. It would take no citation of authority, nor inspection of surveys and welfare statistics to demonstrate that, without adequate provisions for recovery for victims or heirs of victims involved in airlines disasters, such persons may well become a charge upon state and federal governments thus increasing tax burdens for all. The United States Government acted to remove the burden from its citizenry and place the risk upon those who encounter the risk for profit.

Finally, in this jet-age, where air carriers, both foreign and domestic, inveigh upon the public to travel internationally

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4/ Clearly, the shibboleth that the "Law of Nations" which was violated must create a cause of action would be wholly untenable in the context of this ground of jurisdiction. See: Abdul-Rahman Omar Adra v. Clift, 195 F.Supp. 857 (DC Maryland 1961).

over great distances, there surely must be a "Law of Nations" which will say to an air carrier that it must not engage in such conduct as amounts to willful misconduct with resultant catastrophe; surely, there must be a "Law of Nations" that will suggest that, before a carrier, or its airframe manufacturer, can invite that international public aboard, the aircraft must be airworthy and be designed with systems that are reasonably safe. Plaintiff, in his complaint, alleges that neither BEA nor HSA lived up to that commitment which they owed. But, there is more to support this view. The International Civil Aviation Organization (ICAO), an Agency of the United Nations, to which both the United States and the United Kingdom belong, has as an important mission the promotion of safety in civil aviation among the nations of the world and concerns itself directly with questions of airworthiness. See: Secretary-General, Basic Memorandum on the International Civil Aviation Organization (Montreal, 1949). An International Agreement to promote air service between the United Kingdom and the United States was entered into between the two countries. 60 Stats. 1499 Article 4 of that Agreement provides that Certificates of Airworthiness, Certificates of Competency and Licenses issued or rendered valid by one country shall be recognized as valid by the other. If we are to automatically recognize the airworthiness of a British aircraft and the competency of its pilot then surely the United States has an interest in both

those questions which may be litigated in its courts in an appropriate case such as the one at bar.

III

CONCLUSION

Plaintiff respectfully contends that the District Court has Subject Matter Jurisdiction pursuant to 28 U.S.C. § 1331 in that the Warsaw Convention is a self-executing Treaty of the United States, and that Treaty especially provides for such jurisdiction in Article 28(1) inasmuch as plaintiff's decedent purchased her ticket in the United States; that the fundamental objective of the Warsaw Convention is to provide an internationally uniform system of liability and litigation rules, which are substantive in nature; that the history of the debates and evolutionary processes of the Convention demonstrate that the Convention must be construed to mean that it internally creates a cause of action for the benefit of victims claiming thereunder, and that any other interpretation would defeat the fundamental purpose of the Convention. That whether or not a "cause of action" is created by the Convention for any other purpose, in the sense that the examination involves a question of Subjcet Matter Jurisdiction, a contrary holding would cast all potential plaintiffs back into the "jungle-like chaos" which would otherwise affect international air disaster litigation. Surely there is more to the uniformity provided by the Convention than simply the limit on liability,

and a contrary ruling would even place that provision in question if one were to look to the place of accident as the sole source of the cause of action.

Further, plaintiff respectfully suggests that § 1331 does not require the Treaty to provide an entire cause of action, but merely that it be an element of the cause of action, and that such is the case here. Therefore, the Komlos, Noel, etc. line of cases are not controlling on the question before the court; plaintiff further respectfully suggests that those cases did not require a ruling on the "cause of action" issue, and that, further, a complete exploration of the history and background of the Convention was not examined therein. When read in the context of the Debates, the intent of the framers, and the effect given the Convention by other legal systems, one should conclude that the Convention provides a cause of action ex contractu.

If this is a tort action, then in addition to the jurisdictional grounds referred to above, the District Court has Subject Matter Jurisdiction pursuant to 28 U.S.C. § 1350 in that it has been demonstrated that the Warsaw Treaty both prescribes and proscribes standards of conduct, and that plaintiff's complaint alleges violations thereof; that Article 30(3) unambiguously provides for a cause of action, and that plaintiff's complaint for loss of checked baggage vests the District Court with jurisdiction hereunder.

The Warsaw Convention, the Montreal Agreement, and well-established principles of international aviation safety are each sufficient as a "Law of Nations" which must be recognized if progress is to be made in avoiding air disasters such as the case at bar, the notorious "Paris Air Crash" or the more recent aviation catastrophe in the Canary Islands.

It is respectfully urged that this case be reversed and remanded to the District Court.

Respectfully submitted,

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STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above entitled action; my business address is 10844 Ventura Boulevard, North Hollywood, California. On June 28, 1977, I served the within Appeal from the Order of Dismissal and Joint Appendix No. 77-7201

on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States post office mail box at North Hollywood, California, addressed as follows:

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I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 1977 at North Hollywood, California.

Esiquia Gonzales

Esiquia Gonzales